APPELLATE COURT

OF THE

STATE OF CONNECTICUT

A.C. 36364

LARRY DAVIS

v.

COMMISSIONER OF CORRECTION

BRIEF OF THE DEFENDANT-APPELLANT
WITH ATTACHED APPENDIX

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Nature of the Proceedings

Larry Davis (Davis) was tried in 2004 in a consolidated case involving three separate offenses occurring on different dates and involving different victims (Standberry, Smith, and Hughes). Davis was convicted in the two informations involving Standberry and Smith, and acquitted in the third information involving Hughes. He was also convicted of a violation of probation. (Memorandum of Decision dated 10/28/13 at 1-2 (Memo)) He was sentenced to a total effective sentence of fifty years with respect to the Standberry case (T. 8/6/04 at 23) and to a total effective sentence of thirty years with respect to the Smith case, to be served consecutively for a total sentence, including the violation of probation, of eighty years. (Memo at 2; T. 8/6/04 at 24) His conviction was affirmed by the Supreme Court. *State v. Davis*, 286 Conn. 17 (2008).

Davis filed his habeas petition on May 22, 2008. His Second Revised and First Amended Petition was filed on October 11, 2011. His case was heard on November 21-22, 2011, January 30, 2012, and April 3, 2012. (Cobb, J.) The habeas court denied his petition by Memorandum of Decision dated October 28, 2013. Davis was granted certification to appeal by order of November 15, 2013. (Cobb. J.) This appeal followed.

Statement of Facts

Summary

Davis' trial was about identification. (T. 6/1/04 at 41) There were no forensics nor any inculpatory statements linking Davis to any of the offenses. Victoria Standberry[1], the

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[1]Standberry used a variety of names – including Cannon, Thomas, Gibbs, and Manning. (T. 5/25/04 at 53-55, 67-68, 77-82, 89-90, 110-11; see T. 4/3/12 at 96, 121-23) She is referred to at trial as Victoria Gibbs Standberry (T. 5/25/04 at 14) She had several prior larceny convictions. (T. 5/25/04 at 67-68, 77-78)

victim in the first case, had been best friends with Taraneisha Brown for sixteen years. Brown was dating Davis; however, Standberry had only met him once, for a few minutes, a week or two before she was shot, and they had barely exchanged a word. Lenwood Smith, the victim in the second case, and Davis were strangers, although Smith had a vague familiar feeling about the person he spoke to, who seemed to know him from his youth.

The State's theory of the Standberry case, looking at the evidence available to the habeas court, seems to be that Standberry or her boyfriend vandalized Brown's car over a $600 to $1,200 debt. In response, Brown told Davis where her best friend worked and parked her car. (T. 5/25/04 at 37) Davis shot his girlfriend's best friend three times, nearly killing her. Although Brown presumably knew that Standberry accused Davis of this offense, Davis never contacted Standberry (T. 5/25/04 at 36-37) and later married Davis. (See T. 5/26/04 at 77; 11/21/11 at 64, 69, 80, 86)

The jury, which was not made aware of the alleged vandalism, had troubles reaching a verdict in the Standberry case although it ultimately convicted Davis. (See T. 6/4/04 at 1-2; 6/7/04 at 10-16)

At the time of Smith's case, four years after Standberry was shot, Davis was a fugitive – having failed to appear for a trial in October, 2001. He was being sought by Connecticut's Violent Crime Fugitive Task Force and was found in Florida in October, 2003. The State's theory of the Smith case is that, despite being a fugitive, Davis allegedly went to a New Haven strip club, had a conversation with Smith (who at best was vaguely familiar to him), identified himself by his nick-name, then asked for a ride and robbed Smith. The jury reached a verdict as to Smith before it reached its verdict as to Standberry.

Standberry: The Debt and Vandalism

Six or seven months before she was shot on September 28, 1998, Standberry bought "a wall unit" costing either $600 or $1,200 for Brown. (T. 5/25/04 at 35; HEx 17 at 9; HEx 18 ¶5) Brown made intermittent payments. (T. 5/25/04 at 35) On the day before she was shot, Standberry had asked Brown whether Brown could give her something towards the wall unit. (T. 5/25/04 at 36) Standberry told police that she and Brown never had a dispute. (HEx. 17 at 9) Brown said that she and Standberry had been arguing about the money, and that Standberry was upset with her because she had not made payments on the debt for a couple of months. (HEx. 18 ¶5)

A week or two before she was shot, Standberry met Davis for the first and only time. (T. 5/25/04 at 30) They were in each other's presence for five or ten minutes at Brown's house. (T. 5/25/04 at 30) Davis said hello to her, but they did not converse. (T. 5/25/04 at 31) Standberry only knew his first name, not his last name. (T. 5/25/04 at 33)

Shortly after midnight on the morning of September 28, 1998, Brown reported to police that her car had been vandalized. (HEx. 18 ¶6; see T. 11/21/11 at 66-67) The front window was smashed, the head light was broken, and all four tires were flattened. (HEx. 18 ¶6) Brown told police that neighbors had seen Standberry's car parked near Brown's car before the vandalism. (HEx. 18 ¶6) Standberry told police that Brown heard that Standberry's boyfriend[2] was spotted by others near Brown's car. (HEx. 18 ¶6) Standberry said that she did not vandalize Brown's car. (HEx. 17 at 8) She did not know if her boyfriend had done so, but he had not had her car that night. (HEx. 17 at 8)

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[2]Standberry testified, outside of the jury's presence, that a few months before she was shot, her then-boyfriend threatened her with a black handgun. (T. 5/25/04 at 94-96) Standberry had filed a complaint against him on June 24, 1998. (T. 5/25/04 at 94)

Standberry: The Shooting and Investigation

Standberry had lunch with her boyfriend at her job at Yale Hospital that day. (T. 5/25/04 at 15, 96-97) At about 9:35 p.m. on September 28, 1998, Standberry was shot in a nearby parking lot as she returned to her car after work. (T. 5/25/04 at 16, 19; HEx 17 at 2-3) The parking lot was dark, lit by streetlights. (T. 5/25/04 at 28-29; 4/3/12 at 98-99)

At trial, Standberry said that when she got into her car, she noticed sneaker clad feet crawling on the car next to her. (T. 5/25/04 at 21, 55-56, 104) When the person stood up, she saw a light-skinned male with a scarf or bandana wrapped around the lower part of his face. (T. 5/25/04 at 22, 102, 107-09; 4/3/12 at 99) The man had light brown eyes, corn rows[3], and a silver gun. (T. 5/25/04 at 23, 102; 4/3/12 at 99-102, 106-07) Standberry started to shut her car door. (T. 5/25/04 at 23, 105; 4/3/12 at 103) It swung open and she was shot three times by a second culprit. (T. 5/25/04 at 24; 4/3/12 at 103)

Standberry had been watching the first culprit and did not see the second until she was shot with a black gun. (T. 5/25/05 at 64, 113; 4/3/12 at 103) He was short, with dark, rough skin. (T. 5/25 at 31) The lower part of his face was concealed by a scarf covering his mouth. (T. 5/25/04 at 24, 31-32, 107-09; 4/3/12 at 104) She saw long dreadlocks in a ponytail. (T. 5/25/04 at 24, 31; 4/3/12 at 108) After shooting her twice, the second culprit slowly walked away. (T. 5/25/04 at 24) At trial, she did not recall him saying anything. (T. 5/25/04 at 46-47) The first culprit crawled away to the back of the parking lot. (T. 5/25/04 at

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[3]Standberry explained that plats are neater than dreadlocks, you can see scalp and parts. (T. 5/25/04 at 44) Dreadlocks are a nappier style twist. (T. 5/25/04 at 44) A corn braid is a continuous braid, close to the skin, that goes in one direction (T. 5/25/04 at 65) Another witness said that dreadlocks hang, braids are plaited to the head. (T. 5/25/04 at 119) At the habeas hearing, Standberry was reluctant to explain the difference between various hairstyles. (T. 4/3/12 at 101-02, 106-07)

64, 103) Standberry drove herself to the nearby Children's Hospital. (T. 5/25/04 at 26-28)

Police swiftly came out to Standberry's car – she could barely breathe, was in a great deal of pain, and thought she was going to die. (T. 5/25/04 at 28, 32) Although, Standberry claimed that she recognized Davis as the second culprit at the scene (T. 5/25/04 at 32), she did not say so to Officer Niccarato. (T. 6/1/04 at 20-21; 11/21/11 at 59; HEx 15) Instead she gave a physical description of both culprits and said one culprit told her "this is pay back". (T. 6/1/04 at 21-23; HEx 15) Later, she did not recall this first conversation with police. (T. 5/25/04 at 61-62, 66)

Standberry spoke to Detective Rodriguez while she was in the emergency room. (T. 5/25/04 at 126; 4/3/12 at 5; HEx. 18) Rodriguez described her as "hesitant", "in severe pain", but "clear". (T. 5/25/04 at 126, 135; 4/3/12 at 7) Rodriguez said she told him that she was shot by "Larry", who was "Tara's" boyfriend. (T. 5/25/04 at 127; 4/3/12 at 7-9)

Standberry recalled that she gave police Davis' first name after her second surgery. (T. 5/25/04 at 33) She identified Davis from an array the day after she was shot.[4] (T. 5/25/04 at 39, 130-31; 4/3/12 at 20-21, 58-59) Detective Rodriguez said she picked Davis immediately. (T. 5/25/04 at 134) She did not recall her statement, she said she was in a lot of pain. (T. 5/25/04 at 47) Rodriguez recalled that Standberry was still in pain and under some medication when police met with her that morning. (T. 4/4/12 at 11, 14)

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[4]Rodriguez admitted that he had been reprimanded in 2001 for prompting a witness during a 1998 photo array identification, that he had said the witness made that identification without hesitation, and that he said that he would have gotten rid of the recording of the procedure if he had known it was going to cause him problems. (T. 5/25/04 at 139-40; see 4/3/12 at 22-29)

Rodriguez' trial testimony is unclear about whether he or Detective Breland showed the array to Standberry; Rodriguez said he was present. (T. 5/25/04 at 129-30; see T. 4/3/12 at 20-21, 32-33, 87)

On October 2, 1998, Detective Rodriguez wrote a report in which he claimed that three days earlier, on September 29th, he spoke with Diane McKinnie, Brown's mother, who said that she told Standberry that she was shot because Brown's car had been broken into; neighbors saw Standberry fleeing the scene.[5] (HEx 16; 4/3/12 at 15-18, 88) McKinnie blamed Davis for the problems between Brown and Standberry. (HEx 16) In a transcript of an interview on the evening of September 29th, Standberry said she talked to McKinnie[6], who said that Brown's car had been vandalized and McKinnie and Brown thought she did it.[7] (HEx 17 at 2, 7-8; see T. 4/3/12 at 11-14, 17-19) She was not asked about the conversation at trial. At the habeas hearing, Standberry did not recall the conversation. (T. 4/3/12 at 114) McKinnie, testifying at the habeas hearing, said she did not call Standberry or make those remarks to her. (T. 11/21/11 at 74, 78-79) Standberry said Brown did not call her or visit her after she was shot. (T. 5/25/04 at 36, 112)

McKinnie testified at the habeas hearing. (T. 11/21/11 at 64-90) McKinnie recalled talking to officers, who asked if she knew Brown, Davis, and Standberry. (T. 11/21/11 at 69, 77, 89) She was not sure if they asked about a shooting; she did not know anything

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[5]At trial, Rodriguez said he first spoke with Brown, who said that her boyfriend's name was Larry Davis. (T. 5/25/04 at 128) No record of that conversation was admitted into evidence.

[6]At the habeas hearing, Standberry said that the morning after she was shot, she called everyone – including her family – with the help of other people in the room. She did not recall if she spoke to McKinnie that morning. (T. 4/3/12 at 114)

[7]In the arrest warrant application, Rodriquez said that when he met with Standberry at 9 a.m. on September 29th, Standberry said she had just finished speaking with McKinnie over the phone and that McKinnie told her she was shot because Brown's car had been vandalized. Rodriquez said he then went to McKinnie's house where she confirmed the conversation with Standberry. (HEx. 18 ¶ 7; see also T. 5/25/04 at 128-29)

about it. (T. 11/21/11 at 69, 77-78) When asked if she told Standberry at any time that she had been shot because Brown's car had been vandalized, McKinnie said "of course not, no." (T. 11/21/11 at 69, 74-75, 78) When she was shown a copy of Rodriguez' report (HEx. 16), she said that it was not true – she had met with two detectives, but she did not make the statements attributed to her. (T. 11/21/11 at 71-72, 76-77, 80, 88-90)

Davis' parole sponsor said that Davis was at his home on the night Standberry was shot. (T. 5/27/04 at 89-94) Davis arrived at around 6:30 or 7 p.m. in his work uniform shirt and pants and was there until midnight, when Brown arrived and they left together. (T. 5/27/04 at 94-95, 100-01)

The State offered additional evidence that on September 29, 1998, Davis did not come to work for his regular shift. (T. 5/25/04 at 115-118, 129) The day earlier, he had left early because he received a call about his girlfriend's car. (T. 5/25/04 at 117, 120) Police arrived at Davis' work site looking for Davis at about 3 p.m., but he had left work at about noon. (T. 5/25/04 at 116, 129; HEx 18 ¶ 8) Police looked for him, but did not find him. (T. 5/25/04 at 131; 5/26/04 at 32-33) He did not report to his parole officer after September 22, 1998. (T. 5/26/04 at 31) Davis was later arrested in Georgia on September 14, 1999, and was returned to Connecticut. (T. 5/21/04 at 2; 5/26/04 at 35)

The Smith Case

As the Supreme Court explained in *State v. Davis*, 286 Conn. 17 (2006):

> [Smith], was at a club in New Haven on January 25, 2002. After speaking with the [culprit] for approximately twenty minutes, he left at 2 a.m. The [culprit] stopped Smith in the parking lot and asked for a ride to Sheffield Street. Smith agreed, and the [culprit] and his friend entered Smith's vehicle. After arriving, the [culprit] asked Smith to drive them to Carmel Street, where an individual known as `Mizzy' owed him money. After Smith drove to the bottom of a hill, the [culprit] took out a gun and threatened him. Smith

> continued on to Carmel Street and parked. The [culprit] placed his gun against Smith's head and demanded money. Smith gave the [culprit] his wallet and told him that he could get more from an automated teller machine. Smith drove to a nearby bank and, after parking, fled to a nearby gas station. Smith telephoned the police and showed them the bank parking lot where he had left his vehicle. The police recovered Smith's vehicle approximately one week later.

Id. at 25. Justice Katz wrote in her concurring opinion that:

> Smith had ample opportunity to observe the [culprit] that night. Smith testified that, when he first had been approached by the [culprit] at a club on the night of the robbery, the [culprit] looked familiar from previous contact some time earlier. Smith and the [culprit] spoke for approximately twenty minutes before leaving the club. After they left the club together in Smith's car, the [culprit] sat in the passenger's seat directly next to Smith for approximately twenty more minutes. Smith testified that the [culprit] had referred to himself as "Lord Devine" or "Devine," and the defendant stipulated to the fact that he had been known by those names since the late 1990s. Approximately two months after the robbery, Smith identified the defendant from a photographic array. Although the defendant attempted to attack inconsistencies between Smith's statement to the police on the night of the robbery and his subsequent statement two months after the robbery, those inconsistencies either were unrelated to identification or were insignificant matters, such as whether Smith had said that the [culprit] had "a braid" or "braids" of hair sticking up.

Id. at 56. Although the Club had a security system, police never asked to review its recordings. (T. 11/22/11 at 17)

Smith testified at the habeas hearing. (T. 11/21/11 at 91-107) He agreed that the array was presented to him simultaneously. (T. 11/21/11 at 94) There was no place where he could say the array did not contain the culprit. (T. 11/21/11 at 94) The officer who presented the array knew Davis was the suspect; Smith was not told the array was blind. (T. 11/21/11 at 94-95, 103, 106)

An Identification Expert Testifies in Habeas

Dr. Jennifer Dysart, a psychologist and well-known expert in eyewitness identification research, testified at the habeas hearing. (T. 11/22/11 at 53-61; HEx 26)

Dysart explained the three stages of memory (acquisition, storage, and recall) and that memory does not work like a video recording. (T. 11/22/11 at 62-63) She discussed how memory changes, and how contamination or suggestion can influence memory. (T. 11/22/11 at 63-64)

In 2004, it was generally accepted that stress adversely affects memory. (T. 11/22/11 at 65-66, 75) Standberry had been shot three times – obviously it was a stressful event. (T. 11/22/11 at 92) Smith was threatened at gunpoint, presumably he was under high stress as well. (T. 11/22/11 at 89)[8] Dr. Dysart discussed the importance of exposure duration – how long the witness had to see the culprit – and how it can be diluted if a weapon is visible, if the witness is looking at two culprits, or if the culprit's face is partially obscured. (T. 11/22/11 at 72-77, 83-85, 88, 94-95, 99-100) With regard to Smith, she cautioned that one should focus on the time the witness is looking at the culprit's face, not the entire time they were together, and raised concerns about the extent to which Smith's attention was divided between the culprit and his friend. (T. 11/22/11 at 86, 88) She discussed delay, and the adverse effects on memory of the two months between when Smith was robbed and the identification procedure. (T. 11/22/11 at 87-88) She discussed unconscious transference – when you have a general sense that a person is familiar and make an error in trying to figure out who the person is. (T. 11/22/11 at 74, 85-86) Dr. Dysart

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[8]The State may argue that Smith conversed with the culprit before being threatened with a gun and thus stress is not a factor. There is no scientific testimony supporting breaking up a memory in this way. See generally Loftus & Burns, *Mental Shock Can Produce Retrograde Amnesia*, 10 MEMORY & COGNITION 318 (1982) (noting that upsetting incident affects memory of preceding events). See also Hope et als, *Witnesses in Action: The Effects of Physical Exertion on Recall and Recognition*, XX PSYCHOL. SCI. 1, 4 (2012) (test subjects had poorer recall of information given to them in a briefing prior to high-intensity exercise).

also discussed confidence, and how a witness' confidence can be bolstered by external information. (T. 11/22/11 at 73-74) The State suggested that Standberry's sole brief interaction with Davis a week or two earlier might have affected her identification – Dr. Dysart agreed that it could, but a mistake was still possible. (T. 11/22/11 at 95-96)

Dr. Dysart was concerned about the Standberry array because "as an eyewitness expert what stands out to me is that not very many of [the distractors] matched the description that [Standberry] provided to law enforcement in this case."[9] (T. 11/22/11 at 69; HEx 12) Dr. Dysart did not mention that in the Smith array Davis is the only person wearing the khaki and white clothing commonly worn by inmates. (HEx. 13)

Dr. Dysart also discussed the importance of double-blind and sequential identification procedures and the research supporting such procedures in 2004. (T. 11/22/11 at 69-72) The array procedures were not double-blind, and there was no confidence statement taken immediately afterward.[10] (T. 11/22/11 at 76) As Dr. Dysart explained, in 1999, the National Institute of Justice had recommended taking a confidence statement from a witness immediately after an identification, before the detective signs the page or document the witness signed. (T. 11/22/11 at 76, 105) Dr. Dysart explained that a proper procedure should be followed regardless of whether Standberry told police she believed Davis had shot her before she was shown the array. (T. 11/22/11 at 96-97) "It

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[9]Rodriguez said that he "just needed a photo board of eight African-Americans of similar appearance, including [Davis]. Rodriguez did not distinguish between braids and dreadlocks in the array. (T. 4/3/12 at 30-31) He did not know the difference between braids and dreadlocks. (T. 4/3/12 at 31) Standberry said four to six of the images had dreadlocks, one to three did not. (T. 4/3/12 at 116)

[10]Both are now required in Connecticut. See Gen. Stat. § 54-1p.

doesn't necessarily make it reliable just because you yelled out the person's name in the identification." (T. 11/22/11 at 99)

Argument

Davis' trial was about identification. (T. 6/1/04 at 41) There were no forensics nor any inculpatory statements linking Davis to any of the offenses. Standberry and Rodriquez' claims about McKinnie's alleged hearsay statement were not before the jury. All the jury had before it was Standberry's identification of the person who shot her in a darkened parking lot as her best friend's boyfriend, who she had met once, a week or two earlier, and had barely spoken to; and Davis' not going to work the next day and fleeing when he was sought by police. In Smith's case, all the jury had was Smith's identification of someone who he thought was vaguely familiar, and Davis' subsequent arrest in Florida.

At the heart of this case is trial counsel's obligations to educate himself about eyewitness identification research by reviewing the relevant science when the central evidence in a case will be the eyewitness identification of a stranger or near-stranger. It was unlikely that Berke could have called an identification expert to testify in 2004, but, under *Santos v. Commissioner*, 151 Conn. App. 776, 785-86 (2014), he still had an obligation to either consult an expert or sufficiently educate himself about the field. At one time, eyewitness identification might have been deemed a matter of common knowledge, with courts raising doubts about the reliability of eyewitness identification research and inferentially the need for counsel to be familiar with that research. By 2004, that conclusion was in doubt. The explosive growth of eyewitness identification research starting in the 1980s and 1990s; the ever-growing list of defendants exonerated by DNA who had been the victims of flawed identifications; the acceptance of eyewitness identification research

by the Department of Justice in its 1999 Guide; and references by Connecticut and other appellate courts to the growing science[11], all should have warned trial counsel in this case that eyewitness identification is as much a scientific field as DNA. Effective assistance of counsel required at least self-education in this area, if not consultation with an expert. The decision to offer an expert's testimony is separate from the obligation to investigate and to be prepared to properly cross-examine witnesses.

A proper investigation is vital to developing an effective cross-examination, preparing an offer of proof in order for an expert to testify at trial, and anticipating in closing argument the obvious question about why Standberry would have named Davis by raising the possibility of a good-faith mistake. Although not at issue in this habeas hearing, an expert would also have been helpful in developing appropriate jury instructions in the absence of expert testimony. Attorney Robert Berke's failure to do so resulted in representation that was constitutionally inadequate.

Standberry was a sympathetic witness for the prosecution – there is no dispute that she was a genuine victim of a shooting (see e.g. T. 5/25/04 at 38, 112) who cried when shown photographs of the crime scene. (T. 5/25/04 at 20, 33) She movingly testified about her fear and her prayers as she struggled to get help, and her injuries. (T. 5/25/04 at 25-26, 28) Not only was she sympathetic, the State argued that there was not one piece of evidence suggesting a grudge between Standberry and Davis and asked:

> What possible reason would [Standberry] have to pick out [Davis], of all the people in the world, as being the shooter for some false reason? There is

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[11]See e.g. *State v. Porter*, 241 Conn. 57, 135 (1997); *State v. McClendon*, 248 Conn. 572, 590-612 (1999) (Berdon dissenting); *State v. Reddick*, 224 Conn. 445, 471-79 (1993) (Berdon dissenting).

> none. There's nothing in this case to suggest that she would do that. There is a little bit in this case to suggest that she had a debt that was owed to her by [Brown], but wouldn't she name [Brown] as being the shooter if that were some kind of motive? Why name the boyfriend that she's met one time? It doesn't make any sense, and if it doesn't make any sense it isn't there. And there has to be some evidence for you to draw a conclusion like that, and there isn't any. Doesn't it make more sense that [Standberry] is going to pick out the person who shot her to accuse of shooting her? You know she's scared of the guy. Why would she want to put [Davis] on the spot instead of the person who shot her? No reason. It doesn't make any sense. Your common sense tells you it doesn't make any sense and therefore it isn't what happened.
>
> This should've been done back there. Six years later. Not only is the claim that she falsely accused him back then, but she maintains that false accusation for six years.

(T. 6/1/04 at 68-69)

Davis' trial attorney, Berke, provided ineffective assistance of counsel because he did not investigate eyewitness identifications so that he could answer why Standberry and Smith could have each made a good faith mistake in concluding that Davis was their assailant, and how the identification procedure could have contributed to the error. (see T. 11/22/11 at 78-80) This is particularly troubling where Berke believed that his client did not commit the Standberry offense. (See 1/30/12 at 54)

Berke testified in the habeas hearing. (T. 1/30/12 at 50-132) He had little recall of the details of the case or his investigation. (see T. 1/30/12 at 51,55-71, 86-88, 90-91, 106) There is no indication that he read any treatise, read any law journal or scholarly articles, or went to any continuing legal education on eyewitness identification to prepare for this case. Unlike the attorney in *Santos*, he did not informally consult an expert in eyewitness identification. He did not retain an eyewitness identification expert; he had never retained or used one. (T. 1/30/12 at 78, 110) Berke had filed a motion to suppress (HEx. 27), but did not file an accompanying memorandum. (T. 1/30/12 at 71-77, 111-12) He withdrew the

motion prior to trial, but he did not recall why. (T. 1/30/12 at 77-78, 112-13)

Berke did not offer an eyewitness identification expert. He recalled that in 2004 "expert testimony in regards to eyewitness identifications were not permissible in Connecticut." (T. 1/30/12 at 109, 128) Berke also said he did not think eyewitness expert testimony was persuasive because he thought judges had their own experience dealing with the issue and he did not think it would be persuasive to juries. (T. 1/30/12 at 110)

I. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN THE STANDBERRY CASE WHEN HE FAILED TO EDUCATE HIMSELF ABOUT EYEWITNESS IDENTIFICATION RESEARCH.

Davis raised a number of challenges to Attorney Berke's handling of Standberry's identification of him. The underlying problem is that Berke did not educate himself about eyewitness identification research in order to fulfill his ethical obligation under Connecticut Code of Professional Conduct Rule 1.1 to have the knowledge and preparation reasonably necessary for the representation, and to fulfill his legal duty to make reasonable investigations to make a reasonable decision that a particular investigation is unnecessary under *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984). A proper investigation would have assisted him in developing an effective cross-examination, preparing an offer of proof in order for the expert to testify at trial, and responding to the State's closing argument. His failure to investigate eyewitness identification research resulted in representation that was constitutionally inadequate.

A. Facts and Standard of Review.

In *Perry v. New Hampshire*, 132 S.Ct. 716 (2012), the United States Supreme Court recognized again the fallibility of eyewitness testimony. It noted that a series of safeguards caution juries against placing undue weight on eyewitness testimony of questionable

reliability.

> These protections include the defendant's Sixth Amendment right to confront the eyewitness. Another is the defendant's right to the effective assistance of an attorney, who can expose the flaws in the eyewitness' testimony during cross-examination and focus the jury's attention on the fallibility of such testimony during opening and closing arguments. Eyewitness-specific jury instructions, which many federal and state courts have adopted, likewise warn the jury to take care in appraising identification evidence. The constitutional requirement that the government prove the defendant's guilt beyond a reasonable doubt also impedes convictions based on dubious identification evidence.

(internal citations omitted) *Id.* at 728-29. These safeguards depend upon an attorney who is sufficiently informed about eyewitness evidence that he or she can effectively cross-examine witnesses, and explain why a sincere witness is nonetheless mistaken in closing argument. It is crucial that an attorney be well-informed about eyewitness testimony because, as the Connecticut Supreme Court recognized, "the methods traditionally employed for alerting juries to the fallibility of eyewitness identifications — cross-examination, closing argument and generalized jury instructions on the subject — frequently are not adequate to inform them of the factors affecting the reliability of such identifications." *State v. Guilbert*, 306 Conn. 218, 243 (2012). See also *State v. Johnson*, 312 Conn. 687, 712 n. 8 (2014) (Rogers, C.J., concurring) ("The holding in *Guilbert* was responsive to growing concerns that cross-examination, argument of counsel, and generalized jury instructions were not always adequate to inform juries of the factors affecting reliability of eyewitness identifications.")

There is no indication Berke investigated eyewitness identification research or reviewed of any treatises on this issue in preparing for this case. He did not consult an eyewitness identification expert. (T. 1/30/12 at 78, 109-110, 128) Berke did not pursue a

motion to suppress the identifications (T. 1/30/12 at 71-78, 111-13; HEx. 27) He challenged Standberry's credibility with her use of multiple names, her prior criminal record, discrepancies between her statements to police just after she was shot and statements made later in the emergency room and after she had been operated on, and a discrepancy between her testimony claiming that Davis had assaulted her and a civil complaint where she said her attacker was unknown. (T. 5/25/04 at 52-109, 113-114) He did not focus on the reasons why she might have made a good-faith mistake.

In his closing, Berke emphasized the discrepancies between Standberry's initial response, where she merely described the culprits, and her later claim that she recognized one as Davis (T. 6/1/04 at 57-62) He referred to Standberry's different names, criminal record, and vagueness of her testimony about when she was married and divorced, to imply that she was lying about recognizing the culprit. (T. 6/1/04 at 59-60, 61-62)

The habeas court concluded that Berke's cross-examination was adequate, and his decision not to contact or offer an expert was reasonable. (Memorandum of Decision) Davis disagrees.

In order to show that an attorney provided ineffective assistance of counsel, the petitioner must show that counsel made errors so serious that he or she was not functioning as counsel guaranteed by the Sixth Amendment and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Ledbetter v. Commissioner*, 275 Conn. 451, 458 (2005); see *Strickland v. Washington*, 466 U.S. 668 (1984). The habeas court judges the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct. *Calabrese v. Commissioner*, 88 Conn. App. 144, 151

(2005).

Courts often presume that trial counsel acted reasonably. *Strickland* warns that the petitioner "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). However, a decision not to investigate an issue and his subsequent performance cannot fairly be attributed to a "strategic decision" arrived at by "diligent counsel ... draw[ing] a line [based on] good reason to think further investigation would be a waste." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005). "Effective assistance of counsel imposes an obligation [on] the attorney to investigate all surrounding circumstances of the case and to explore all avenues that may potentially lead to facts relevant to the defense of the case. * * *] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Gaines v. Commissioner of Correction*, 306 Conn. 664, 680 (2012).

The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. *Id.* at 677.

B. Standberry made a Good-Faith Mistake when she Identified Davis as her

Assailant.

There were numerous warning signs that Standberry could have made a good-faith mistake. The parking lot was dark. (T. 5/25/04 at 28-29) The attack was sudden and over quickly. There were two culprits, both were wearing scarfs that partially obscured their faces and both were armed. (T. 5/25/04 at 23-25, 113) Standberry had been focused on the other culprit until moments before she was shot. (T. 5/25/04 at 23-24, 64) When Standberry spoke to responding officers, she had been shot three times, was having trouble breathing, and was in a great deal of pain. (T. 5/25/04 at 24, 28, 32) She did not give Davis or Brown's name to the responding officers or even say she knew her attacker. Instead, she gave a physical description of both culprits. (HEx. 15)

The only factors in favor of her identification are that the second culprit was close to her, she claimed she was familiar with him, and she was certain that Davis' photograph in the array was her assailant.

1. Investigation

Counsel has a duty to make reasonable investigations. *Strickland v. Washington*, 466 U.S. 668, 691 (1984). (Post-Trial Brief at 4) Without researching eyewitness identification science, Attorney Berke was ill-prepared to understand and explain how Standberry could have made a good-faith mistake. Berke did not consult with an identification expert, because he believed he was barred from presenting such an expert at trial. (T. 1/30/12 at 109) Using an expert to educate one's self about a technical issue and how to best present it to a jury is not the same as offering an expert at trial. See *Santos v. Commissioner*, 151 Conn. App. 776, 785 (2014) (attorney spoke with two expert witnesses and collected literature on topic, but did not retain an expert for trial).

Concerns about the reliability of eyewitness identification are not new. The United States Supreme Court wrote that "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification" in *United States v. Wade*, 388 U.S. 218, 228 (1967). In 1991, the Connecticut Supreme Court wrote that "The dangers of misidentification are well known and have been widely recognized by this court and other courts throughout the United States." *State v. Tatum*, 219 Conn. 721, 733 (1991)[12]. Exonerations in cases involving flawed eyewitness testimony were well-known in 2004; some had occurred in Connecticut. See e.g. *Miller v. Commissioner*, 242 Conn. 745 (1997); *State v. Hammond*, 221 Conn. 264 (1992). A competent defense attorney should have been well-aware of the risks of mistaken eyewitness identification.

Counsel should have been aware of a growing body of research and law challenging long-held assumptions about perception, memory, and identification. The habeas court observed that there had been a significant change in the law regarding expert witnesses on eyewitness identifications in the years since Davis' trial. (Memo at 8) The Court's decision in *State v. Guilbert*, 306 Conn. 218 (2012) was the result of decades of research and litigation, much of which was available in 2004, had Berke investigated this issue. For example, all six studies mentioned by the *Ledbetter* Court as raising concerns about limited correlation between accuracy and confidence, had been published between 1980 and 2000. *State v. Ledbetter*, 275 Conn. 534, 566 (2005). *Ledbetter* also referred to The National Institute of Justice, "Eyewitness Evidence: A Guide for Law Enforcement," United

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[12]It is axiomatic that a reasonably competent attorney would know the controlling case law in his own state. See *King v. Kemna*, 266 F.3d 816, 824 (8th Cir. 2001) (en banc); *Whittington v. Ohio River Co.*, 115 F.R.D. 201, 207-08 (E.D. Ky. 1987).

States Dept. of Justice Pub. No. NCJ 178240 (1999), and to additional studies about "relative judgment" as it affects simultaneous identification procedures. *Ledbetter*, supra, at 571-575. Many of the cases and studies relied upon in the *Guilbert* decision also pre-date 2004. There was a vast array of case law and research available to Berke which would have helped him better understand the significance of, for example, the partial disguise worn by the culprits, the effects of stress, and the presence of firearms.

Berke said he did not think eyewitness expert testimony was persuasive because he thought judges had their own experience dealing with the issue and he did not think it would be persuasive to juries. (T. 1/30/12 at 110) See SUPREME JUDICIAL COURT STUDY GROUP ON EYEWITNESS EVIDENCE, REPORT AND RECOMMENDATIONS 149-159 (2013) (minority statement cautioning that judges' awareness and acceptance of eyewitness identification issues varies widely.) This does not explain why he did not review the research to be better prepared and more persuasive in his cross-examination and closing argument. There is no indication in the record that Berke had the education or experience necessary to assess eyewitness identification evidence, and to make for himself a reasonable, informed determination as to whether an expert should be consulted or called to the stand. See *Pavel v. Hollins*, 261 F.3d 210 (2d Cir. 2001) (ineffective assistance for failure to consult with medical expert in child sex case).

Had Berke consulted an eyewitness identification expert, a subsequent tactical decision not to call one might have fallen well within "the wide range of reasonable professional assistance." See *Santos v. Commissioner*, 151 Conn. App. 776 (2014). Here, however, Berke made various decisions without properly researching the area and/or consulting with an expert. Had he done so and then concluded that he would not offer such

an expert, his decision would then be the sort of tactical decision which courts decline to second-guess. *Lewis v. Commissioner*, 89 Conn. App. 850, 868 (2005). Without such investigation, Berke's decision is entitled to limited deference. *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984) (strategic choices made after less-than-complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation).

Having conducted no investigation into the significance of, for example, briefly perceiving only a portion of the face of an armed culprit in a stressful situation, Berke could not have made an informed tactical decision about how to cross-examine Standberry and the investigators to bring this to the jury's attention. Berke remained unaware of whether and to what extent an expert's research and advice might have helped Davis' case. In these circumstances, counsel's decision not even to contact an expert as part of his pre-trial investigation was not professionally reasonable.

2. *Cross-Examination*

Attorney Berke faced a difficult task. As the *Guilbert* Court recognized:

> Cross-examination, the most common method, often is not as effective as expert testimony at identifying the weaknesses of eyewitness identification testimony because cross-examination is far better at exposing lies than at countering sincere but mistaken beliefs. An eyewitness who expresses confidence in the accuracy of his or her identification may of course believe sincerely that the identification is accurate. Furthermore, although cross-examination may expose the existence of factors that undermine the accuracy of eyewitness identifications, it cannot effectively educate the jury about the import of these factors. "Thus, while skillful cross-examination may succeed in exposing obvious inconsistencies in an [eyewitness'] account, because nothing is obvious about the psychology of eyewitness identification and most people's intuitions on the subject of identification are wrong ... some circumstances undoubtedly call for more than mere cross-examination of the eyewitness.""

(footnotes omitted) *Id.* at 243-44. See *United States v. Mathis*, 264 F.3d 321, 342 (3d. Cir. 2001) (noting that "it is difficult to comprehend how [presence of] weapons' destructive effect on memory might be elucidated through cross-examination"). See Cutler, EYEWITNESS TESTIMONY: CHALLENGING YOUR OPPONENT'S WITNESS, 97 (Natl. Inst. Tr. Advoc. 2002) (discussing the challenge of cross-examining the good-faith mistaken witness); Loftus & Doyle, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL, § 10-1 et seq. (3d ed. 1997) (same).

This case called for more than cross-examination by an experienced attorney who had not researched eyewitness identification issues. The habeas court disagreed, citing familiar case law regarding the tactical nature of cross-examination, the utility of limited cross-examination, and that deficient performance is more than just not inquiring deeply into certain or all areas. (Memo at 17) The habeas court found it significant that:

> Attorney Berke reasonably challenged the victim's credibility by questioning her about her use of different names (Standberry, Gibbs, and Cannon), her ability to accurately recall and report facts surrounding the shooting and the petitioner's appearance, discrepancies between the statements she gave to the police and her in-court testimony, her 1987 conviction for larceny in the second degree, her 1990 conviction under the name Victoria Cannon for larceny, and a separate incident where she was threatened by another individual with being shot. A fair reading of the entire cross-examination of Ms. Standberry conducted by Attorney Berke shows that it did not fall below an objective standard of reasonableness.

(Memo at 17)

Attorney Berke's challenges to Standberry's credibility and the discrepancies between her two statements to police and at trial are not in dispute. Berke was ineffective because he was ill-prepared to elicit testimony from Standberry, or the police witnesses, explaining why those discrepancies and and the circumstances of her perception of the two

culprits suggest good-faith error. Berke was ill-prepared to explain to the jury:

- why it was significant that part of the culprit's face was obscured[13]
- why the presence of two assailants was significant
- why the presence of a firearm was significant
- why Standberry's very brief interaction with Davis before the assault did not make her so familiar with him as to overcome the brevity of the assault
- why a good-faith mistake based on unconscious transference was plausible, and
- how stress adversely affects memory

(T. 11/22/11 at 73, 75-77, 84-86).

Research would have helped Berke cross-examine Standberry and the investigators to present this information to the jury. He did not clearly develop a theme that Standberry's identification was a good-faith mistake, allowing the State to argue, in effect, that the jury would have to conclude that Standberry lied in order to acquit Davis.

At the time of trial, *State v. Kemp*, 199 Conn. 473 (1986) and *State v. McClendon*, 248 Conn. 572 (1999) held that expert eyewitness identification testimony was unnecessary because attorneys could adequately bring these issues out in cross-examination. See *Watkins v. Sowders*, 449 U.S. 341, 347 (1981) (opining about the

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[13]Standberry had opined at the habeas court that the culprit wore a handkerchief below his nose. "It was nothing that would conceal your identity." (T. 4/3/12 at 104) Had Berke investigated what constitutes a disguise for purposes of its effect on eyewitness identification, he might have been able to show that obscuring even a portion of the face is significant. See e.g. *Patterson v. LeMaster*, 130 N.M. 179, 21 P.3d 1032 (2001) (obscured by bandana and stocking cap); *State v. Ranieri*, 586 A.2d 1094, 1100-01 (RI 1991) (witness could only testify that defendant's upper lip was similar to culprit's); *State v. Ramirez*, 817 P.2d 774, 782 (Utah 1991) (trial court and jury should consider whether witness could see culprit's entire face).

adequacy of cross-examination in a mistaken identification case). Leaving aside the fundamental question of whether cross-examination can adequately protect a defendant against a witness' good faith mistaken identification, see Epstein, *The Great Engine That Couldn't: Science, Mistaken Identity, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 766 (2007); Cutler ed., EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION, 57-61 (2009), Berke did not do so.

In *McClendon*, the Court noted that defense counsel, who had consulted with and offered the testimony of an eyewitness identification expert, "exhaustively probed the possibility of mistaken identification." *State v. McClendon*, 248 Conn. 572, 588 (1999). See also *State v. Kemp*, 199 Conn. 473, 479 (1986) (defendant, who had offered an identification expert also "fully cross-examined" each witness regarding their identification). Here, key factors about Standberry's identification were barely touched upon, and the jury given no guidance through questioning, closing, or specific jury instructions about how to weight those factors.

This is not a case, such as *Gallimore v. Commissioner*, 112 Conn. App. 478 (2009), where defense counsel made a tactical decision not to pursue a line of questioning. Here, Berke tried to undermine Standberry's testimony through cross-examination, but was unsuccessful because he had not properly investigated eyewitness identification research.

The State may argue that a trial attorney's cross-examination decisions are strategic. Strategy, however, cannot be formed in a vacuum. Attorney Berke's cross-examination decisions are reasonable, only if he had adequately investigated the case and made informed tactical decisions.

3. Familiarity

The habeas court concluded that Standberry claimed to be familiar with Davis. "The victim, Standberry, had met the petitioner at her friend [Brown's] house a week ro two before the shooting and spoke with him for five-to-ten minutes." (Memo at 10) The habeas court is mistaken – Standberry testified that she did not have a conversation with Davis; he was conversing with Brown at Brown's house and only said "hello" to Standberry. (T. 5/25/04 at 30-31) A single meeting, at which the witness and defendant barely exchange a word, does not create familiarity. In *Guilbert*, the court found four witnesses were familiar enough with the defendant that the risk of misidentification was small – one had known the defendant "for a while"; another had known the defendant for approximately ten years; a third saw him as a regular customer in the shop where she had worked for more than one and one-half years before the shooting; the last had previously lived with the defendant for "quite some time....". *Guilbert*, *supra*, at 260.[14] Here, Standberry and Davis are virtual strangers. Not only was this single encounter not enough to make Berke's decision not to consult or offer an identification expert harmless, it highlights the problems caused by Berke's inability to explain to the jury why this single meeting did not mean that Standberry

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[14]The cases relied upon by *Guilbert* also do not support the habeas court's conclusion. In *Hager v. United States*, 856 A.2d 1143, 1148-49 (D.C. 2004) a witness had seen the defendant in her neighborhood for "well over a year". In *Bonnell v. Mitchel*, 301 F.Supp.2d 698, 761 (N.D. Ohio, 2004), a witness had been involved in a narcotics deal with the defendant and had a prior dispute with him. Neither *Rosario v. Ercole*, 582 F.Supp.2d 541, 581 (SDNY 2008) nor *Commonwealth v. Christie*, 98 S.W.3d 485, 491 (Ky. 2002) concern identifications by witnesses who claim familiarity with the defendant. In *State v. Clopten*, 223 P.3d 1103, 1113 (Utah 2009), the witness and defendant were strangers. There the Court limited "familiarity" to a family member, long-term business associate, neighbor or friend, a definition that would not apply to this case. See also *People v. Collins*, 60 N.Y.2d 214, 219, 456 N.E.2d 1188 (Ct. App. 1983). "Familiarity" does not apply where "where the prior relationship is fleeting or distant". *Id.* See *People v. Rodriguez*, 79 N.Y.2d 445, 593 N.E.2d 268 (Ct. App. 1992); *People v. Williamson*, 79 N.Y.2d 799, 800, 588 N.E.2d 68 (Ct. App.1991).

could not have made a good-faith mistake. The habeas court abused its discretion in concluding that Standberry's single nearly wordless encounter with Davis created sufficient familiarity to counterbalance the absence of an investigation into eyewitness identification or the absence of an expert's testimony.

4. Closing Arguments.

As Justice Palmer wrote in *State v. Marquez*, 291 Conn. 122, 203 (2009) (Palmer, J. concurring), "jurors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable. Thus, while science has firmly established the inherent unreliability of human perception and memory, ... this reality is outside 'the jury's common knowledge,' and often contradicts jurors' commonsense understandings." With research, Berke would have been better able to explain the infirmities in Standberry's identification to the jury in his summation. This specific point was not raised in the habeas hearing, but should be considered by this Court as an implicit part of the petitioner's ineffective assistance claim. In *Kemp*, the defense counsel who had consulted with and offered the testimony of an eyewitness identification expert "expounded on the dangers of misidentification in closing argument." *State v. Kemp*, 199 Conn. 473, 479 (1986). In *McClendon*, the defense attorney who had consulted with and offered the testimony of an eyewitness identification expert "described at length the possible reasons for a mistaken identification" in his final argument. *State v. McClendon*, 248 Conn. 572, 588 (1999).

Here again, Berke faced a difficult task, and he did so without adequate preparation. As *Guilbert* also recognized:

> Defense counsel's closing argument to the jury that an eyewitness identification is unreliable also is an inadequate substitute for expert testimony. In the absence of evidentiary support, such an argument is likely

to be viewed as little more than partisan rhetoric.

Id. at 244. Worse, neither attorney can easily argue scientific matters to the jury absent expert testimony. In *State v. Singh*, 259 Conn. 693, 714-15 (2002), the prosecutor was chided, inter alia, for opining about whether the witness' description was consistent with the defendant's build and how accurately someone of the witness' age could guess another person's age. Not only did Burke not address the prosecutor's question – without proper investigation and an expert's testimony, he lacked the tools to adequately respond.

5. *Use of an Expert at Trial.*

The habeas court concluded that:

> The petitioner has not proved that trial counsel's failure to present an expert at trial was deficient in view of the law on the admissibility of expert testimony in 2004. In addition, given the law disfavored expert testimony at the time of the petitioner's trial, the petitioner has not proved that had trial counsel attempted to call an expert witness at trial, the court was likely to have admitted such testimony. Furthermore, given the circumstances of the identifications in this case, and that [victims] were familiar with the petitioner, the petitioner has not proved that such testimony would have altered the result of the trial.

(Memo at 11)

Connecticut has never categorically barred the admission of eyewitness identification expert testimony. *State v. Guilbert*, 306 Conn. 218, 233 (2012), *Velasco v. Commissioner*, 119 Conn. App. 164, 174 n. 4 (2010). However, there is no requirement that defense counsel consult or offer expert testimony in every case. Where trial counsel has consulted with such experts, and made the tactical decision not to produce them at trial, such decisions properly may be considered strategic choices. *Antonio A. v. Commissioner*, 148 Conn. App. 825, 833 (2014). Unlike counsel in *Antonio A.*, there is no evidence that Berke "had considerable training in [this area], having attended many

seminars and training sessions, and having read books and numerous journal articles." *Id.* at 835. Here, Berke's decision not to offer an expert was made without proper investigation, and should not be deemed a strategic choice.

Trial counsel's obligation to investigate and prepare for trial has been discussed in several Connecticut cases including *Anderson v. Commissioner*, 313 Conn. 360 (2014) (expert on STDs); *Michael T. v. Commissioner*, 307 Conn. 84 (2012) (expert in a child sexual abuse case); *Crawford v. Commissioner*, 285 Conn. 585 (2008) (police procedures); *Copas v. Commissioner*, 234 Conn. 139 (1995) (mental health defenses); *Williams v. Warden*, 217 Conn. 419 (1991) (third-party lookalike defense); *Siemon v. Stoughton*, 184 Conn. 547 (1981) (mistaken identity defense); *Santos v. Commissioner*, 151 Conn. App. 776 (2014) (dog sniff expert); *Michael T. v. Commissioner*, 144 Conn. App. 45 cert granted 310 Conn. 938, (2013) (child sexual abuse); *Peruccio v. Commissioner*, 107 Conn. App. 66, 76 (2008) (child sexual abuse); *Jeffrey v. Commissioner*, 36 Conn. App. 216 (1994) (failure to investigate surrebuttal evidence), *Baez v. Commissioner*, 34 Conn. App. 236 (1994) (mental health defense). Connecticut has not considered the specific question of failure to consult an expert or educate oneself to assist the attorney in understanding key scientific issues and preparing to cross-examine the State's witnesses.

Other jurisdictions have found trial counsel ineffective for failing to consult with and/or call an appropriate expert. See *Dugas v. Coplan*, 428 F.3d 317, 329-31 (1st Cir. 2005) (arson); *Bell v. Miller*, 500 F.3d 149 (2d Cir. 2007) (effect of medications and blood loss on memory); *Gersten v. Senkowski*, 426 F.3d 588, 607 (2nd. Cir. 2005) (child sexual abuse); *Eze v. Senkowski*, 321 F.3d 110, 127-28 (2d Cir. 2003) (child sexual abuse); *Pavel v. Hollins*, 261 F.3d 210 (2d Cir. 2001) (child sexual abuse); *Lindstadt v. Keane*, 239 F.3d

191, 202 (2d Cir. 2001) (child sexual abuse); *Soffar v. Dretke*, 368 F.3d 441 (5th Cir. 2004) (ballistics expert); *Rogers v. Israel*, 746 F.2d 1288 (7th Cir. 1984) effect of wounds); *United States v. Tucker*, 716 F.2d 576, 581 (9th Cir. 1983) (accountant); *Paine v. Massie*, 339 F.3d 1194, 1202 (10th Cir. 2003) (battered women's syndrome); *Holsomback v. White*, 133 F.3d 1382, 1387-89 (11th Cir. 1998) (child sexual abuse); *Mullins v. State*, 30 Kan. App. 2d 711, 46 P.3d 1222 (2002) (counsel cannot insulate ineffective assistance by labeling it strategy; where outcome of trial depended on child sexual abuse victim's statements, failure to investigate, employ expert to attack testimony constituted deficient performance); *Cravens v. State*, 50 S.W.3d 290 (Mo. App. 2001) (ballistics expert). See also *State v. Maestas*, 984 P.2d 376 (Utah 1999) (trial counsel ineffective for not challenging identification testimony). Common to these various opinions is an attorney who did not personally possess technical expertise in an area key to the defendant's case and thus could not adequately either cross-examine prosecution witnesses or rebut prosecution witnesses with defense experts. This Court should conclude that, in the instant case, trial counsel's representation was constitutionally defective for failing to educate himself.

The State may argue that eyewitness expert testimony was disfavored in Connecticut in 2004. Davis agrees. Such testimony was permissible at the trial court's discretion, but was, admittedly, rare. While Davis disagrees with the habeas court's conclusion, he recognizes that it would be hard to show that the trial court would have allowed Dr. Dysart or an equivalent expert to testify in 2004. But this issue is more broad – without consulting an expert, or otherwise educating himself about eyewitness research, Berke was ill-prepared to provide a framework for the jury to understand the flawed eyewitness identifications in this case through cross-examination and summation. An

expert is one way to provide that framework. While eyewitness identification expert testimony may have been disfavored in 2004, it was not inadmissible. This was a strong case for an expert to give the jury a framework to evaluate Standberry's emotional claim that Davis had shot her. Berke could not make a strategic decision not to offer an expert without having investigated the issue.

C. Davis was Deprived of a Fair Trial Whose Result is Reliable Due to Attorney Berke's Failure to Either Educate Himself or Consult an Identification Expert.

The habeas court held that Davis could not prove that the failure to call an identification expert caused him prejudice. The problem arose before the decision to call the expert – it arose with Berke's investigation into eyewitness identification research. It is axiomatic that in a habeas matter premised on the ineffective assistance of counsel, the petitioner must show that "counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The petitioner's burden of proving that a fundamental unfairness has been done must be met by demonstrable realities, not by speculation *Mitchell v. Commissioner*, 109 Conn. App. 758, 766 (2008). "The strength of the state's case is a significant factor in determining whether an alleged error caused prejudice to the petitioner. The stronger the case, the less probable it is that a particular error caused actual prejudice." *Griffin v. Commissioner*, 98 Conn. App. 361, 367 (2006). See *Carneiro v. Commissioner*, 109 Conn. App. 513, 519 (2008) (petitioner failed to show prejudice where result of proceeding would not have been different even if witness testimony had been excluded) *Peruccio v. Commissioner*, 107 Conn. App. 66, 84 (2008) (court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury).

The State's case was not strong. As noted above, Standberry had a very limited opportunity to view her assailant. She did not tell Officer Niccarato that she recognized him. She had only met Davis once and barely exchanged a word with him. Not surprisingly, the jury had trouble reaching a verdict in the Standberry case. Had Berke anticipated the State's rhetorical question and explained that Standberry could have chosen Davis because of a tragic good-faith mistake, Davis might well have been acquitted in this case.

In *Bell v. Miller*, 500 F.3d 149 (2d Cir. 2007), the Court held that trial counsel was ineffective for failing to call a medical expert. It noted that

> Our disposition of this appeal does not announce a per se rule requiring a defense counsel to consult with a medical expert in order to cast doubt on a key prosecution witness. But where the only evidence identifying a criminal defendant as the perpetrator is the testimony of a single witness, and where the memory of that witness is obviously impacted by medical trauma and prolonged impairment of consciousness, and where the all-important identification is unaccountably altered after the administration of medical drugs, the failure of defense counsel to consider consulting an expert to ascertain the possible effects of trauma and pharmaceuticals on the memory of the witness is constitutionally ineffective.

Here, Davis urges this Court to conclude that where the primary evidence identifying a criminal defendant as the perpetrator of a crime is the eyewitness testimony, defense counsel' failure to consult an eyewitness identification expert and/or to thoroughly educate himself in this field is constitutionally ineffective.

Davis' habeas petition should be granted, the Standberry conviction should be reversed, and the case remanded for new trial.

II. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN THE SMITH CASE WHEN HE FAILED TO EDUCATE HIMSELF ABOUT EYEWITNESS IDENTIFICATION RESEARCH.

Had Attorney Berke properly investigated eyewitness identification, he would have

also been better able to challenge Smith's identification in the joined case. Standberry's case focuses on "general-impairment" variables – things that interfere with a witness' ability to make an identification. Smith's case focuses on "suspect-bias" variables – things about the identification procedure that made it more likely that Smith would pick the police suspect in the array. See Goldstein, Ed., 2 COMPREHENSIVE HANDBOOK OF PSYCHOLOGY, 156-57 (2003).

Smith and Davis were likewise virtual strangers. Smith had a longer opportunity to view his assailant before he was threatened with a firearm, but the same concerns about stress, divided attention, and weapons focus would apply. Berke could have better challenged the suggestiveness of the photo array procedure, pointed out that Davis was the only one dressed in the white t-shirt and khaki shirt typically worn by inmates, and the two month delay between the robbery and the identification, raising reasonable doubt. If this Court reverses the Standberry conviction, it should likewise reverse the Smith conviction and send both cases back for new trial.

A. Facts and Standard of Review.

The Standard of Review for this issue is the same as for the preceding issue.

B. Davis' Attorney Provided Ineffective Assistance of Counsel in Smith's Case, Because of the Same Failure to Investigate That Plagued the Standberry Case.

Had Attorney Berke researched eyewitness identification, he would have been able to find the same materials used in the briefs in *State v. Ledbetter*, 275 Conn. 534, 571-72 (2005), which persuaded the Connecticut Supreme Court to write that "There is good empirical evidence to indicate that eyewitnesses tend to identify the person from the lineup who, in the opinion of the eyewitness, looks most like the culprit relative to the other

members of the lineup." He could have used this evidence to undermine the weight of Smith's identification, regardless its admissibility.

In sum, using a simultaneous presentation, Smith was likely to pick the person in the array who most closely resembled his memory of the culprit. If the culprit was present, he would, of course, most closely resemble himself. But if the culprit was not present, Smith was far more likely to chose an innocent suspect if he most closely resembled the culprit, rather than tell the police that the culprit was not present. Similarly, Berke would have been able to find the same materials used in the briefs in *State v. Nunez*, 93 Conn. App. 818 (2006) and discussed by Dr. Dysart (T. 11/22/11 at 71-72) to challenge the reliability of a non-blind, simultaneous array. While this information might not have been sufficient to persuade a trial court to suppress Smith's identification, it might have persuaded a jury that the array procedure led Smith to make a good-faith mistake.

Smith had a 15-30 minute conversation with the culprit inside the strip club. The record has no evidence about lighting, but it was probably not brightly lit. Smith also spent some time in his car with the culprit, who is seated in the front passenger seat – again at close range, but with limited lighting. Closeness and time do not mean a mistake was impossible – in 2012, Hubert Thompson was exonerated of sexual assault and kidnapping charges based on DNA. Muñoz & Altimari, *DNA Testing Clears Man Convicted Of Rape In 1998*, HARTFORD COURANT, March 16, 2012. At trial, the victim recognized her assailant as "the drug dealer from whom she had purchased drugs approximately one week earlier"; approached him to buy more drugs; and had a 15 to 20 minute interaction with the culprit at close range. *State v. Thompson*, 118 Conn. App. 140 (2009). This is a case in which a

trial court or jury would likely conclude that the witness was sufficiently familiar to dispense with an expert – but the victim was mistaken. Thompson was not her assailant.

It is not clear how much attention Smith was paying to the culprit, and specifically to the culprit's face, during their conversation in the club. In the car, his attention was divided with driving, by the second person in the car, and later by the gun. (T. 11/22/11 at 88) The effects of stress and weapons focus on the reliability of an identification are important factors for the jury's consideration. (See T. 11/22/11 at 73, 75 (stress, weapons focus))

The testimony does not include a contemporaneous statement of Smith's certainty about his identification before police gave him any feedback. (See T. 11/22/11 at 76, 86-87) Smith said in his recorded statement, made after the identification, that he was sure. He also said at trial that he was sure. Had Attorney Berke researched this area, he would have come across the Department of Justice's 1999 report on Eyewitness Identification discussed by Dr. Dysart. (T. 11/22/11 at 76) which called for contemporaneous confidence statements before feedback. (These contemporaneous statements, along with other important safeguards are now required by General Statutes § 54-1p.) He would also have come across the same materials cited in the *Ledbetter* briefs which raised some concerns about the relationship between confidence and accuracy, although at the time the Court did not find the studies to be definitive. *Ledbetter*, *supra*, at 568. (See also T. 11/22/11 73-74 (discussing confidence inflation by external information about an identification))

Finally, Attorney Berke could have pointed out more effectively the significance of the nearly two month delay between when Smith was robbed on January 25, 2002, and when he made his identification on March 20, 2002. (See T. 11/22/11 at 88)

It is also possible that a trial court would have been willing to let Dr. Dysart testify

about the reasons the eyewitness procedure could have led to a mis-identification even if it limited her testimony about general impairment factors like stress and lighting. Dr. Dysart was allowed to give similar testimony at the motion to suppress hearing in *State v. Outing*. It is unclear whether her testimony would have been admitted at trial. See *State v. Outing*, 298 Conn. 34 (2010).

From the foregoing the jury could have concluded that Smith made a good faith mistake – Davis was the person in the array who most closely resembled the culprit – but there was reasonable doubt that he was the culprit.

C. Davis was Harmed by Berke's Failure to Adequately Investigate and Cross-Examine the Witnesses in Smith's Case.

Had Attorney Berke better investigated eyewitness identifications, he would have been better able to challenge the weight of Smith's identification from a simultaneous non-blind photo array and raise reasonable doubt about whether Davis was the person who identified himself as "Devine"[15] or whether another black male shared that nick-name or was using Davis' nick-name as his own.

Conclusion

For the reasons set forth herein, Davis' habeas petition should be granted, the Standberry and Smith convictions reversed, and the case remanded for new trial.

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[15]Davis did not appear for a trial in October, 2001. (See T. 5/26/04 at 63-68) Connecticut's Violent Crime Fugitive Task Force had been trying to locate him pursuant to a warrant for his failure to appear. (T. 5/26/04 at 76) Federal authorities found Davis living with Brown in Florida, and arrested him in October, 2003. (T. 5/26/04 at 77) He was using a social security number and identification card with a false name. (T. 5/26/04 at 79, Ex. 31, 32) If Davis was trying to evade authorities in 2001-03, it seems odd that he would identify himself even by nick-name.

Respectfully submitted
The Defendant
By his attorney,

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CERTIFICATION

Pursuant to Practice Book § 62-7, the undersigned certifies that this brief complies with Practice Book § 67-2.

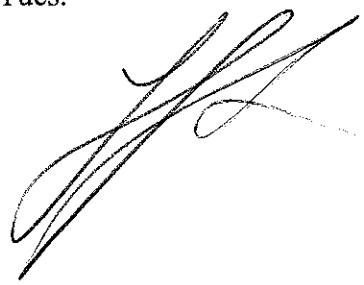
Lisa J. Steele, Esq.

MEMO

To: Crystal Rose
Fm: LJS
Re: Larry Davis

Brief is enclosed, due 10/9/14. Please copy and file. Electronic copy has been filed – confirmation attached.

I will be out of office on Monday and Tues.



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LARRY DAVIS — APPELLATE COURT

v. — STATE OF CONNECTICUT

COMMISSIONER OF CORRECTION — OCTOBER 1, 2014

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Pursuant to Conn. Prac. Bk. §§ 62-7 and 67-2the undersigned certifies that the attached brief and appendix are true copies of the electronically submitted brief and appendix, and that true copies were mailed first class postage prepaid this 1ST day of October 2014, to: Hon. Susan Quinn Cobb c/o Chief Clerk, Superior Court, Judicial District of Tolland at Rockville, 20 Park Street, Tolland, CT 06066; and to Susan Marks, Supervisory Assistant State's Attorney, Juris No. 401795, Office of Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, Tel. (860) 258-5807, Fax (860) 258-2828, DCJ.OCSA.Appellate@ct.gov.

It also is certified that true copies were delivered via Department of Administrative Central Mail and Courier Service to my client, Larry Davis, # #136711, Garner Correctional Institution, 50 Nunnawauk Road, Newtown, CT 06470.

It also is certified that the brief and appendix comply with all the provisions of Conn. Prac. Bk. §67-2 including electronic delivery to all counsel of record.

The undersigned attorney hereby certifies that this brief and appendix do not contain any name or other identifying information that is prohibited from disclosure by rule, statute, court order or case law; and that the brief complies with all provisions of this rule pursuant to Conn. Prac. Bk.§67-2.

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